BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 29632
	)	
FRANK G. BENNETT	)	**BOARD DECISION**
	)	(Precedential)
	)	
From Dismissal From the Position of Education Program Consultant With the Department of Education Sacramento.	)	**NO. 94-01**
	)	January 6, 1994

Appearances: Loren E. McMaster, Attorney, on behalf of the appellant, Frank G. Bennett; Gregory J. Roussere, Deputy General Counsel, on behalf of respondent, Department of Education.

Before Carpenter, President; Stoner, Vice President; Ward, Bos and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Frank G. Bennett (appellant). Appellant was dismissed from the position of Education Program Consultant with the Department of Education (Department) for verbally and physically abusing a fellow Department employee.

In his Proposed Decision, the ALJ found that appellant angrily confronted a co-worker one morning with profane threats, grabbed the co-worker's tie and pushed him against the wall. Although the appellant introduced evidence to support his contention that the adverse action was a pretext for appellant's alleged criticism of departmental policy, the ALJ found the dismissal to be "for cause"

and determined that the incident merited appellant's dismissal.

The Board rejected the ALJ's Proposed Decision, choosing to hear the case itself. After a review of the entire record, including the transcript, exhibits, and written and oral arguments of the parties, the Board finds that the appellant's actions violated Government Code section 19572, subdivisions (m) discourteous treatment of fellow employees and (t) failure of good behavior. The Board, however, modifies the dismissal to a sixty (60) day suspension for the reasons set forth in this decision.

FACTUAL SUMMARY

The appellant began working for the Department in 1977. In 1991, he was appointed as Education Program Consultant. He has no prior disciplinary actions. At the time of the incident, appellant was assigned as a consultant to the HIV/AIDS Prevention, Sexually Transmitted Diseases and Genetics Diseases and Birth Defects Prevention Unit, a unit within the Department's "Healthy Kids/Healthy California" unit. Donald J. Peterson (Peterson) was also a consultant assigned to the HIV/AIDS Prevention unit and had an office cubicle in the same part of the building as appellant's cubicle.

As part of the funding requirements for the HIV/AIDS Prevention program, the Department was required to submit quarterly reports. The appellant was assigned the task of preparing the reports and was instructed to have a quarterly report ready for

Peterson's signature by January 8, 1991, one week prior to the report's deadline of January 15, 1991.

On January 14, the appellant had not provided Peterson with the quarterly report for his signature. At approximately 1:00 p.m. that day, Peterson contacted the appellant and reminded him that the report was overdue for his signature and needed to be signed by the following day. Peterson advised the appellant that he would be at a meeting the rest of that day in room 560 of the building, and that the appellant could bring him the report there during the meeting.

Peterson attended the meeting in room 560 that afternoon, but left briefly to speak with his supervisor, Robert Ryan (Ryan). During the few minutes that Peterson was absent from the meeting, the appellant stepped into the meeting looking for him. Margaret Parks, another Department employee who was chairing the meeting in progress, informed appellant that Peterson had just stepped out. Thereafter, appellant left the meeting. When Peterson returned to the meeting, he was not informed that appellant had come looking for him. Appellant and Peterson had no further contact with one another that day. Appellant was very upset that Peterson had not been in the meeting as promised to sign the quarterly report.

The next morning, January 15, 1991, appellant arrived at work at about 8 a.m. He intended to go to the Beverly Garland Hotel for a directors' meeting as soon as he finished some work at the

office. Upon his arrival at work, the appellant found a memorandum on his desk. The memorandum was signed by Ryan, his indirect supervisor, and instructed appellant that he could not attend the meeting at the hotel. The memorandum further stated that he was to finish up his outstanding assignments in anticipation of an impending transfer. While appellant had recently been unhappy at work and had requested a transfer out of the unit, he was nevertheless greatly angered by the contents of the memorandum.

Soon after reading the memorandum, the appellant confronted Peterson in his office cubicle. The appellant lost all self-control and started yelling profanities at Peterson for "not being there." At first, Peterson did not know what the appellant was talking about. The appellant continued to yell at Peterson for not being present at the meeting the day before to sign the report as he had promised he would be. Appellant's anger continued to rise, particularly after Peterson replied that he had indeed been present at the meeting.

During the time the appellant was cursing Peterson for not being at the meeting, he grabbed Peterson's tie with his hand, wrinkling it, and shoved Peterson up against the wall. He then threatened Peterson that he was going to "cut his balls off and shove them down his throat." The appellant continued to yell at Peterson for not being at the meeting, with his face directly in Peterson's to emphasize his anger.

After Peterson disengaged himself from the appellant, he took appellant's hands in his for a few seconds to protect himself and proceeded to walk down the hallway. Thereafter, another heated exchange took place by the men's restroom. After this skirmish, Peterson and appellant departed separate ways.

While the parties agree that the incident described above did occur, the stories told by the parties diverge in certain respects. According to Peterson, appellant had such a strong grip on his tie, it made it difficult for him to breathe. He further claims that appellant used his grip on his tie to drag him away from his office and into the hallway. He further testified that appellant grabbed him by the throat at one point by the men's restroom, attempted to "knee" him in the groin, and then threw him twice against the wall. It is also Peterson's testimony that at no time did he ever yell back at the appellant, push him in any way or do anything during the incident to provoke appellant's actions. While Peterson claimed at the hearing that he was fearful of his life at the time this occurred, he admitted that he never called for assistance from fellow employees during the incident, nor did he mention to fellow employees what had happened before leaving immediately after the incident for the directors' meeting.

Peterson's version of the incident is supported by Sam Wood (Wood), a student assistant at the Department and best friend of Robert Ryan. Wood claims to have witnessed at least the first part

of the incident from his nearby cubicle while he was on a long distance telephone call to Mr. Robert Kohmescher of the Center For Disease Control in Atlanta. Wood claims that he observed the incident from his cubicle, but remained on the telephone at all times, covering the receiver so as to block the noise from Mr. Kohmescher. In addition to agreeing with Peterson's testimony concerning the incident, Wood testified that while on the telephone, he observed appellant repeatedly checking Peterson's cubicle, waiting for Peterson to arrive that morning. Wood further claims to have left for the hotel himself about 10:30 that morning.

The appellant denies Peterson's and Wood's version of the incident. Appellant admits that he was cursing in Peterson's face, threatening to "cut his balls off", and that he grabbed Peterson's tie for a brief time while pushing him up against the wall. He denies, however, that he refused to let Peterson go when asked or that he ever "dragged" him anywhere by his tie. He claims that after the initial skirmish by Peterson's office, Peterson began walking down the hallway in front of him and that he followed him, yelling to get answers to his questions. He contends that Peterson then turned around, called him a liar, and pushed him. It was only after that that appellant claims he became angry and grabbed Peterson's coat lapels, yelling profanities at him until Peterson asked him to let him go, at which time he did. He denies ever holding or grabbing at Peterson's throat, making it difficult for

him to breathe or kneeing him at any time. He furthermore denies "lying in wait" for Peterson to arrive at work that morning.

In addition to Wood, there were a number of other Department employees who claimed to witness the incident: Jennifer Takos, Tilana Green, Sharon Taylor, Lisa Wright, Ples Griffin, Janie Fong and Diane Davis. Each of these witnesses testified that they heard the appellant shouting profanities at Peterson concerning where he (Peterson) had been the previous day. Of the witnesses who could actually see what was happening every witness, except Tilana Green, testified that they saw the appellant grab Peterson's tie, not his throat.[1]

Each witness also testified that after the shouting and pushing occurred outside of Peterson's office, they saw both men walk freely together down the hall. While these witnesses were in agreement that it was the appellant doing most of the yelling, none of these witnesses claimed to see Peterson being dragged by his tie, nor did they see appellant attempt to knee Peterson in the groin. Furthermore, while these witnesses testified they never saw Peterson pushing the appellant, there was testimony from several witnesses that they did hear appellant yell "get your hands off me" at Peterson. Finally, none of these seven witnesses saw Sam Wood

[1] Tilana Green testified that she saw the appellant grab Peterson's throat. Except for this one difference, these seven Department employees gave similar stories of what occurred. Notably, the ALJ found that appellant grabbed Peterson's tie.

that morning, including Ms. Takos who went looking for Wood to break up the commotion.

After the incident occurred, Peterson left the building and immediately went to the Beverly Garland Hotel. He never mentioned what had happened back at the office, and did not appear to other employees at the meeting to be injured or upset. He later called into work, however, and explained that he would be seeking medical assistance from his doctor - a doctor he was currently seeing for an existing back injury. He subsequently took a few days off work to recuperate and claims that the incident exacerbated his back problems.

The Department dismissed appellant for cause under Government Code section 19572, subdivisions (m) discourteous treatment of the public or other employees and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment.

Appellant admits that he lost his self-control on the day of the incident and should not have confronted Peterson as he did. He contends, however, that the Department is using this incident as a pretext to get him dismissed because they do not like him and his participation in a political group critical of the Department's policies.

Appellant submitted evidence at the hearing that Ryan believed appellant was active in an organization critical of the Department,

and was not pleased by appellant's participation. Appellant also testified that several years ago Ryan made derogatory racial slurs towards him. Ryan denies doing so. In addition, appellant presented the testimony of several Department employees who claimed to have heard Ryan make a number of statements suggesting the Department's intent to "get" the appellant. One employee testified to hearing Ryan tell another person after the incident that "Frank cold-cocked him. I think we really have him this time." Another person testified to hearing Ryan say "I want that SOB out of my unit" about a week before the incident occurred. Finally, one employee claimed to have overheard Ryan tell Sam Wood to "make his story sound good."

Appellant further argues his case of pretext by pointing to evidence presented at the hearing that suggests Wood and Peterson lied about Wood's presence during the incident. Appellant points out that nobody, other than Peterson, (including the seven other persons who testified as witnesses to the incident) ever saw Sam Wood at the office that morning. He also points to the fact that a witness placed Sam Wood at the Beverly Garland Hotel at the time the incident was said to have occurred at the office, and that another witness testified to taking a telephone call about fifteen minutes after the incident had occurred from Sam Wood who told her he was calling from the hotel and had just "heard" what happened. In addition, the appellant introduced copies of the telephone bills

for both Wood's and Mr. Kohmescher's phones. These bills reveal the absence of documentation to support any phone call between the two men on January 14, 1991.

Finally, the appellant argues that the penalty of dismissal is a disparately harsh penalty when compared to prior adverse actions issued by the Department for similar acts. The appellant introduced a prior adverse action of the Department whereby an employee was suspended for only two days for striking a fellow employee on the chin. Another adverse action received in evidence showed that an employee received only a 15-day suspension despite numerous incidents involving yelling profanities at a co-worker, threatening the co-worker with bodily injury, telling the co-worker she had a gun, and throwing her purse at the co-worker. An additional four adverse actions were introduced into evidence by the appellant concerning employees who struck students in their charge. Of the employees who received those four adverse actions, only one employee was dismissed by the Department, and this dismissal occurred only after several incidents of infliction of corporal punishment. Appellant argues that a dismissal for this single brief incident is greatly disproportionate when compared to these other adverse actions.

ISSUES

This case raises the following issues for our determination:

1. Is there sufficient evidence in the record to support adverse

action?

2. What is the appropriate penalty under the circumstances?

DISCUSSION

Sufficiency of the Evidence

After reviewing the record, the Board finds sufficient evidence to support adverse action. Specifically, we find that the appellant repeatedly swore at Peterson, threatening to "cut his balls off and shove them down his throat", grabbed Peterson's tie and pushed him up against the wall while continuing to yell in his face. While the appellant's memory of the incident is rather faint, he admits to these actions. These findings are also supported by the testimony of the majority of witnesses to the incident. We further find that appellant's actions were wanton, malicious, and unprovoked by Peterson as charged in the adverse action. Such actions have no business in the workplace, regardless of whether or not the appellant had been treated poorly in the past by his fellow employees. Appellant had constructive avenues available to him through which to pursue grievances against the Department and its employees, such as the Employee Assistance Program, his union, and in particular, the Board itself. Appellant had no excuse for taking his anger out upon a co-worker through verbal and physical abuse. Persons who commit such acts must be disciplined through adverse action and the Department was within its rights in so doing.

It must be noted, however, that while the Board finds sufficient evidence to support adverse action, it does not find sufficient evidence in the record to support the version of events as proferred by Peterson and Wood, namely, that the appellant ever choked Peterson, kneed him, or dragged him away from his office by his tie.[2]

The Board rejects Wood's version of events as corroborative of Peterson's testimony, as it has difficulty believing that Wood witnessed the incident. We are troubled by the fact that none of the several other employees who witnessed the incident ever saw Wood in the office that morning, including the woman who went looking for him. The record contains serious evidentiary discrepancies concerning Wood's location during the incident, e.g. whether he was at the office on a long distance call or whether he was, as reported, at a meeting at the Beverly Garland Hotel. We are also concerned that the long distance telephone records do not support Wood's story that he was on the telephone with Mr. Kohmescher in Atlanta while witnessing the incident. Even if we were to view the evidence of Wood's location and activities in a light most favorable to Wood, we note that his version of events is

[2] We note that the ALJ did not make express findings of credibility concerning the discrepancies in testimony in the Proposed Decision.

strikingly different from the description given by several other persons who testified concerning the confrontation.[3]

The appellant next contends that the dismissal can not be sustained as there is evidence that the adverse action was issued for an improper purpose. As stated in the ALJ's Proposed Decision, if appellant was dismissed because of his exercise of constitutional rights, then the action is not legal. Bekiaris v. Board of Education (1972) 6 Cal.3d 575, 588, fn 7. If the action was, however, taken in part because of the appellant's speech activities and in part because of the appellant's attack on Peterson, then it must be determined whether absent the exercise of appellant's constitutional rights, the appellant would have been dismissed. Id. at 593.

Although the Board chooses to modify the dismissal to a 60-day suspension based upon the circumstances of this case as discussed below, we find that the appellant's conduct did justify adverse action. Moreover, although we do not choose to believe Peterson's

[3] Based on these discrepancies in the evidentiary record, appellant urges this Board initiate an investigation into charges of perjury against Wood and Peterson. The Board declines to do so. Many cases brought before the SPB involve the resolution of conflicts of testimony and evidence as to the facts underlying the charges. On each occasion, the administrative law judge, and in turn the Board, must assess the credibility of witnesses before arriving at its factual findings. The Board is not prepared to initiate charges of perjury in this case simply because it chooses to credit some witnesses over others in coming to its decision. If the appellant wishes to pursue his contention that perjury has been committed, other avenues are available to him.

and Wood's version of the events of January 15, neither do we find sufficient evidence in the record to conclude that the Department's decision to choose dismissal over other disciplinary measures was the result of an improper motive.

As noted in the Proposed Decision, Robert Ryan, the gentleman appellant alleges was "out" to have him dismissed, did not participate in the adverse action process. Nor was there evidence that the two men who did participate, Gary Smith and Darryl Tsujihara, had improper motives in choosing to dismiss appellant. The Board finds insufficient evidence to conclude that Ryan or the Department brought the adverse action simply because of appellant's alleged political activities.

Finally, appellant contends that his actions were justified as he was provoked, both by Peterson who failed to meet with appellant as promised, and by the great stress imposed upon him over the years by Department officials. While these factors may have been the cause of appellant's loss of control that day, appellant cannot rely on these factors as justification for his actions. We find adverse action against the appellant was justified and was brought against appellant "for cause".

Penalty

In determining the propriety of a dismissal in any case, we are bound by the test set forth in Skelly v. State Personnel Board

(1973) 15 Cal.3d 194, 218:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or is likely to result in [h]arm to the public service. (Citations). Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence. (Id.)

In the instant case, the harm to the public service is obvious. The State of California can not have its employees verbally and physically abusing one another whenever they are frustrated or angry. Profanity, threats, and physical confrontations have absolutely no place in the work environment. Furthermore, violent physical acts by an employee against a co-worker, student, client, patient or member of the public where genuine physical harm is produced or intended, warrant dismissal. Likewise, threats of physical harm, under circumstances where a reasonable person would conclude that the perpetrator was considering acting on the threats, could also justify termination.

In the instant case, we find substantial evidence to support a conclusion that appellant, frustrated, stressed and extremely angry, grabbed Peterson's tie briefly, while pushing him against the wall and yelling profanities at him. While the Board does not condone profanity or the physical act of grabbing or pushing a co-worker to emphasize one's point, we find that, on balance, the circumstances surrounding the misconduct and unlikeliness of recurrence counsel against imposition of the ultimate penalty of dismissal.

We arrive at this conclusion only after finding that appellant did not strike, kick, or choke Peterson. We further find no evidence that the appellant intended to act on the verbal threat he made or ever intended Peterson genuine physical harm.

Appellant's unfortunate loss of self-control did not appear to harm or frighten Peterson despite his testimony otherwise.[4] As Peterson admitted, there was nothing in appellant's history which gave him reason to believe that appellant was a danger to him or had the propensity to inflict harm on others. We find that the "threat" made by the appellant, that he would "cut his (Peterson's) balls off and shove them down his throat", was more an expression of anger than an actual threat of physical harm. Indeed, it appears that Peterson did not take appellant's "threat" literally. One employee who witnessed the incident stated that it looked like Peterson was smiling during the encounter. Other witnesses agreed that Peterson did not appear to be frightened of appellant. Finally, we know that Peterson did not seek help during the incident or report its occurrence after it happened. Rather, he proceeded straight to the Beverly Garland hotel for his meeting. Under these circumstances, we conclude that Peterson did not sustain injuries from the incident, either physically or

[4] There was evidence presented that Peterson saw his physician the day after the incident to determine whether the incident exacerbated an already present back injury. There was no evidence presented, however, as to whether his back <u>was</u> injured as a result of the incident.

emotionally.

While appellant's outburst was clearly harmful to the public interest and is not to be minimized, we view the incident as primarily an aggressive verbal confrontation, rather than an instance of a physical attack with an intent to cause harm. Accordingly, we do not find the public harm to be sufficiently grave to merit appellant's dismissal in the first instance under these circumstances.

In addition, we find the potential for recurrence to be very low. All of the co-workers who testified agreed that appellant is normally an easy going person, and that they believed that his conduct on this occasion was highly unusual. When considering appellant's acknowledgment that his actions were wrong, the stress appellant felt at the time, and appellant's previously long and successful work history, we believe that such an episode is not likely to recur.

We emphasize that absent this single incident, the appellant had a clean thirteen year record with the State. That record distinguishes this case from Gary Blakeley (1993) SPB Dec. No. 93-20, in which the appellant was dismissed for repeated violent acts in the workplace after having been warned by his supervisors against such conduct. While the principles of progressive discipline do not necessarily apply in cases of serious intentional misconduct, a successful long work record is one factor which may

be considered in assessing whether dismissal is appropriate in the first instance.

Having concluded that the penalty of dismissal is too harsh under all of the circumstances, we must consider what is the appropriate penalty. When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion; it is not obligated to follow the recommendation of the employing power. Wylie v. State Personnel Board (1949) 93 Cal. App. 2d 838, 843. However, this discretion is not unlimited. Among the factors that the Board is required to consider are those identified by the Court in Skelly, supra, and discussed above: harm to the public service, the circumstances surrounding the misconduct and likelihood of recurrence.

Appellant argues that any penalty imposed by the Board in this case must be within the range of penalties imposed previously by the Department in similar adverse actions. While it is incumbent

upon departments to be non-discriminatory in their assessment of penalties, as noted in Timothy J. Green (1992) SPB Dec. No. 92-18:

> An agency is not required to impose the exact same penalty in every single case involving similar factual circumstances. There are a variety of factors which may influence an agency to take stronger action in one case than it does in another including the length of the employee's service, the underlying circumstances of the offense, and the overall policy of the agency in seeking to deter the misconduct involved. Thus, unless there is a clear pattern among the cases which demonstrates that a particular case is clearly outside the scope of the usual agency discretion, such evidence will not be admitted. Timothy J. Green at pp. 5-6.

Evidence regarding the penalties imposed by the Department in allegedly similar cases was admitted into the record without objection from the Department. (See p. 10 of this Decision.) [5] While the Board is not bound by the employer's history regarding penalties, given that the evidence was admitted, the Board may consider the level of penalty imposed in similar cases as one of the many factors (e.g. Skelly factors, progressive discipline, length and quality of service) it considers in assessing a just and proper penalty.

After a review of the entire record, we find sufficient justification for modifying appellant's dismissal to a sixty (60)

[5] That is not to say that the ALJ in the instant case applied the Green test and initially made a determination that there was "a clear pattern among the cases" that demonstrated that the penalty imposed on Bennett was "clearly outside the scope of the usual agency discretion." Green had not been adopted as the test for admission of such evidence at the time of Bennett's hearing.

day suspension. As noted in depth above, we view this incident more as an extremely nasty, primarily verbal, confrontation with a co-worker rather than as a physical attack. We further note appellant is a long-term employee with a clean work history and there is no indication that he has ever lost his temper before or that he will again. Given these circumstances, we believe a "just and proper" penalty is a 60-day suspension.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against Frank G. Bennett is hereby modified to a sixty (60) day suspension.

2. The Department of Education shall pay to Frank G. Bennett all back pay and benefits that would have accrued to him had he been suspended for sixty days instead of dismissed.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due Mr. Bennett.

4. This decision is certified for publication as a Precedential Decision. (Government Code section 19582.5).

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board